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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. TIMOTHY KEVIN OWENS, Petitioner.	2 CA-CR 2010-0293-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20053547

Honorable Michael J. Cruikshank, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

Timothy K. Owens
San Luis
In Propria Persona

Robert J. Hirsh, Pima County Public Defender
By Rebecca A. McLean
Tucson
Attorneys for Petitioner

V Á S Q U E Z, Presiding Judge.

¶1 Following a jury trial, petitioner Timothy Owens was convicted of twenty-two felony counts stemming from his involvement in an extensive drug-trafficking enterprise. The trial court sentenced him to six concurrent life terms without the possibility of release for at least twenty-five years, and to various terms of imprisonment on the remaining counts, all to be served concurrently with the life terms. We affirmed his convictions and sentences on appeal. *State v. Owens*, No. 2 CA-CR 2007-0046 (memorandum decision filed Feb. 14, 2008).

¶2 Appointed counsel Rebecca McLean then filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. She also informed the court "that there are a number of other legal claims which [Owens] would like the Court to consider, which counsel did not include in the Rule 32 Petition." She therefore requested that the court allow Owens to file a supplemental pro se motion. The court granted that request and Owens filed a supplemental petition.[1]

¶3 In the petition for post-conviction relief filed by counsel, Owens maintained trial counsel had been ineffective because he had not objected to questions asked by the prosecutor and testimony given in response that he claims violated a pretrial ruling by the trial court and referred to illegal provisions in the witnesses' plea

[1]Although a defendant does not have the right to hybrid representation, *see Montgomery v. Sheldon*, 181 Ariz. 256, 260-61, 889 P.2d 614, 618-19 (1995), *overruled in part on other grounds by State v. Smith*, 184 Ariz. 456, 459, 910 P.2d 1, 4 (1996), "[w]hether to allow such hybrid representation remains within the sound discretion of the trial judge." *State v. Cornell*, 179 Ariz. 314, 325, 878 P.2d 1352, 1363 (1994). Because the trial court allowed, and ruled on, Owens's pro se petition, we will consider his pro se petition for review as well.

agreements. Before trial, counsel filed a motion in limine seeking to preclude the prosecutor from questioning witnesses who would be testifying subject to plea agreements about the truthfulness provision in their plea agreements. Specifically, he argued that the prosecutor would be vouching for the witnesses if he asked them, as he had in the trial of one of Owens's codefendants, if they understood that their pleas would be invalidated if they failed to testify truthfully and that the trial judge would be the arbiter of that truthfulness provision.

¶4 The trial court ruled that the prosecutor could "elicit from the witness the fact of a promise in the plea agreement to tell the truth as a condition of the . . . plea," but could not talk about "the judge watching you." At trial, however, the prosecutor asked the witnesses about the truthfulness provisions in their plea agreements and asked them if they understood that, "independent of the State if the Court makes the same determination, even if we think you're being truthful, . . . the Court can" invalidate the agreement. The witnesses answered that they understood. Trial counsel did not object.

¶5 Owens argued in the petition filed by counsel that by not objecting when the questions and responses were made, trial counsel had "fail[ed] . . . to preserve the favorable [pretrial] ruling" for purposes of appellate review and had allowed the prosecutor to improperly "enhance the credibility of the . . . witnesses." Owens also asserted that because this issue had been "*arguably* preserved" for appellate review, appellate counsel had been ineffective in failing to raise the issue on appeal. Additionally, Owens argued that his trial on "serious drug offender allegations" related to sentence enhancement should have been "bifurcated from the trial of the substantive drug

offenses." He claimed trial counsel had been ineffective in failing to request a bifurcated trial and appellate counsel had been ineffective in failing to raise the issue on appeal.

¶6 In his pro se supplemental petition, Owens raised ten more claims, including claims relating to his "right to a grand jury," his Confrontation Clause rights, his Fourth Amendment rights, the sufficiency of the evidence against him, whether a juror should have been struck from the panel, his right to counsel, the propriety of his sentence, and the jury instructions given at trial. The trial court found each of these claims precluded[2] and summarily dismissed both his pro se petition and counsel's petition in a single ruling.

¶7 McLean filed a petition for review of that ruling on Owens's behalf and Owens filed an additional pro se petition. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Owens has not sustained his burden of establishing any such abuse here.

¶8 On review, Owens reurges his claim that trial counsel was ineffective because he failed to object to the prosecutor's questions and the witnesses' answers about the truthfulness provision in their plea agreements. In order to state a colorable claim of ineffective assistance of counsel, a defendant must establish that counsel's performance

[2]On review, Owens argues that in his reply to the state's response to his supplemental petition he had also asserted appellate counsel had been ineffective in relation to these issues on appeal and that those claims were not precluded. But because the claims were raised for the first time in his reply, they are waived. *See State v. Lopez*, 223 Ariz. 238, ¶¶ 4-7, 221 P.3d 1052, 1053-54 (App. 2009).

fell below an objectively reasonable professional standard and that the deficient performance was prejudicial to the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985).

¶9 Owens contends, as he did below, that the term in each plea agreement providing that the state could, "in its sole discretion," determine the witness had been untruthful and withdraw the plea was illegal. And he maintains that counsel was ineffective in failing to object to the term because it allowed the prosecutor to improperly "enhance the credibility of the . . . witnesses." The trial court rejected this argument, concluding our decision in *State v. Campoy*, 220 Ariz. 539, 207 P.3d 792 (App. 2009), indicated that such truthfulness terms in plea agreements were not illegal and that the state was entitled to withdraw from any such agreement. The court also determined the plea agreement would require an evidentiary hearing before the state could withdraw from it based on its "interpret[ation]" of the truthfulness clause in conjunction with another clause in each of the agreements. That clause provided the court could find that the witness had testified untruthfully and set aside the plea. Although we agree with the trial court that counsel was not ineffective for failing to object to the testimony, we do not agree with its reasoning in full.

¶10 Contrary to the trial court's suggestion in its ruling, we did not state or suggest in *Campoy* that the state could withdraw unilaterally without judicial approval from a plea agreement that had been judicially accepted. Indeed, we pointed out in that decision that the trial court had "permitted the state to withdraw from the plea agreement." *Campoy*, 220 Ariz. 539, ¶ 9, 207 P.3d at 796. And our statement that the

state had a right to withdraw from the plea agreement in that case was made in that context. *Id.* ¶ 36.

¶11 "[T]o set aside a judicially approved plea bargain, the prosecution may not act unilaterally but . . . on adequate evidence, a judge must find that there has been a substantial breach of the bargain which the court had approved." *United States v. Simmons*, 537 F.2d 1260, 1261 (4th Cir. 1976), *cited with approval by State v. Warren*, 124 Ariz. 396, 401, 604 P.2d 660, 665 (App. 1979). Before a trial court has accepted a plea agreement, however, the state may exercise its discretion to withdraw from the plea agreement unilaterally. *See* Ariz. R. Crim. P. 17.4(b) ("An agreement may be revoked by any party prior to its acceptance by the court."). Thus, even assuming, without deciding, that Owens had standing to object to a term of his codefendants' plea agreements—a proposition for which he cites no authority—because the term was not illegal we agree with the trial court that counsel was not ineffective for failing to object on that basis.[3]

¶12 We agree with the trial court's related conclusion that, even if the terms of the agreements were illegal, nothing about them "compel[led] the witnesses to disregard their oaths of truthfulness or bind them to a particular script or result." And we agree that "the provisions did not frustrate the jury's ability to judge the witnesses' credibility," in part because they were subject to cross-examination. *See State v. Rivera*, 210 Ariz. 188,

[3]Owens has not pointed us to anything in the record suggesting the plea agreements of the witnesses here had been accepted by a court at the time of their testimony.

¶ 11, 109 P.3d 83, 85 (2005) ("Skillful cross-examination should expose to the jury any motivation the witness may have to lie, such as to preserve a favorable plea deal, and the jury must determine the witness's credibility."). In sum, Owens has not established that the court abused its discretion when it rejected his claim that counsel had been ineffective for failing to object to the purportedly illegal terms in the plea agreements.

¶13 Owens also argues the trial court erred in rejecting the other claims raised in the two petitions for post-conviction relief. The court correctly identified and ruled on those remaining issues "in a fashion that will allow any court in the future to understand the resolution," and "[n]o useful purpose would be served by this court rehashing the trial court's correct ruling in a written decision." *State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Thus, although we grant the petition for review, we deny relief.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge